

# **Achieving Diversity: Alternatives to Race-Based Affirmative Action Programs**

*By: Eric Makinen*

## **Introduction**

In this paper, I will show that there are alternatives to race-based affirmative action programs to achieve student body diversity in higher education. In *Regents of the University of California v. Bakke*, the Supreme Court established that student body diversity in higher education is a compelling governmental interest.<sup>1</sup> While that interest certainly existed before Justice Powell announced the Court's judgment in 1978, the decision began the process of determining how universities could lawfully achieve the compelling interest of student body diversity. This is a process that continues today.

In *Bakke*, five justices established that achieving diversity among a student body is a "compelling government interest" and consequently recognized that race may be considered in creating diversity in admissions.<sup>2</sup> These programs have become known as "affirmative action programs."<sup>3</sup> Yet, the application and efficacy of these programs has been debated ever since. In *Grutter v. Bollinger*, the court reaffirmed "the diversity rationale" by upholding the constitutionality of a race-conscious admissions process at the University of Michigan Law School.<sup>4</sup> However, Justice O'Connor, writing for the court, ominously stated that: "we expect that 25 years from now, the use of racial preferences will no longer be necessary to further the

---

<sup>1</sup> *Regents of U. of California v. Bakke*, 438 U.S. 265, 272 (1978)

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> Mario L. Barnes, Erwin Chemerinsky, Angela Onwuachi-Willig, *Judging Opportunity Lost: Assessing the Viability of Race-Based Affirmative Action After Fisher v. University of Texas*, 62 *UCLA L. Rev.* 272, 283 (2015)

interest approved today.”<sup>5</sup> This so-called “expiration date” raises questions of whether or not affirmative action needs to be used in the future, and if not, what types of programs do we need to achieve diversity? Or do we need any programs at all? The courts have not provided answers to these questions. Most recently in *Fisher v. University of Texas*, the Court proscribed a new constraint on affirmative action programs.<sup>6</sup> In *Fisher*, the court did not overrule *Grutter* or ban affirmative action, but it required that the lower courts grant less deference to universities in formulating their affirmative action programs.<sup>7</sup> This decision failed to address whether or not race-based affirmative action programs will be needed in the future.<sup>8</sup>

The Court has been unable – or unwilling – to definitively say if they believe affirmative action programs will continue to be necessary to promote a diverse student body. However, the court stated in *Grutter* that, “race-conscious admissions policies must be limited in time.”<sup>9</sup> The Court has failed to address what these limits are or when they will be necessary.<sup>10</sup> However, several states have taken this message to heart and made broad efforts to limit – and eliminate – race-conscious admissions programs, while still achieving student body diversity.<sup>11</sup> These efforts have proven that race-based affirmative action programs are not the *only* way to achieve true student body diversity in higher education. This paper seeks to critically examine alternatives to race-based affirmative action programs, while still achieving the goal of student body diversity in higher education.

---

<sup>5</sup> *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003)

<sup>6</sup> *Fisher v. U. of Texas at Austin*, 133 S. Ct. 2411, 2416 (2013)

<sup>7</sup> Mario L. Barnes, et al. *Judging Opportunity Lost*.

<sup>8</sup> *Id.*

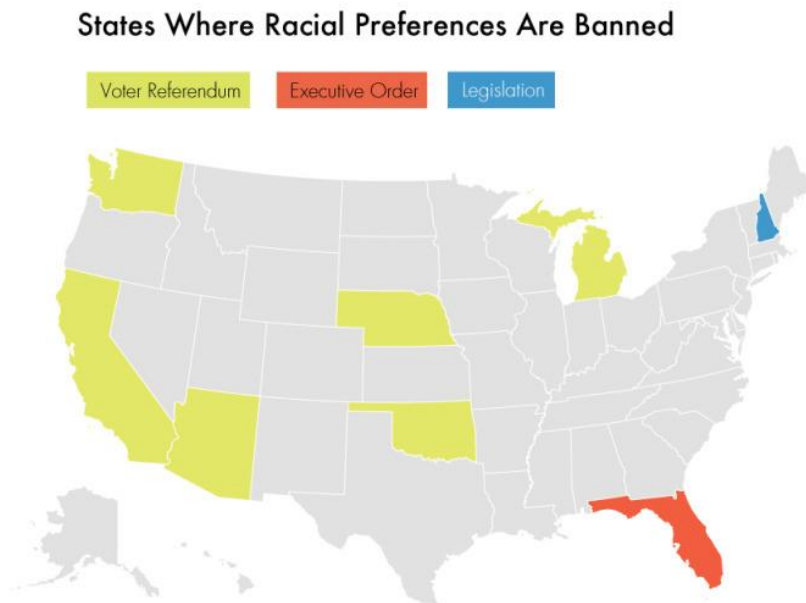
<sup>9</sup> See *Grutter*, 539 U.S. at 342 (“[R]ace-conscious admissions policies must be limited in time.”).

<sup>10</sup> Meera E. Deo, *Empirically Derived Compelling State Interests in Affirmative Action Jurisprudence*, 65 *Hastings L.J.* 661, 663 (2014)

<sup>11</sup> <http://www.pewresearch.org/fact-tank/2014/04/22/supreme-court-says-states-can-ban-affirmative-action-8-already-have/>

## State Bans On Affirmative Action

Currently, eight states have formally banned race-based affirmative action programs at their respective public universities.<sup>12</sup> These states – Arizona, California, Florida, Michigan, Nebraska, New Hampshire, Oklahoma, and Washington – educate 29% of all U.S. high school students.<sup>13</sup> This movement towards banning race-based affirmative action programs began with California’s “Proposition 209” in 1996 and most recently with the passing of Oklahoma’s “State Question 759” in 2012.<sup>14</sup> These states seemingly lack any significant similarities; they are geographically spread across the nation, they have drastically different population sizes, and are situated across the entire political spectrum.



15

Yet, their voters and legislatures have put a stop to the use of race-based affirmative action. This movement towards ending race-based affirmative action begs two fundamental questions: 1) Can

<sup>12</sup> <http://tcf.org/work/education/detail/what-can-we-learn-from-states-that-ban-affirmative-action>

<sup>13</sup> *Id.*

<sup>14</sup> <http://www.ncsl.org/research/education/affirmative-action-state-action.aspx>

<sup>15</sup> <http://apps.tcf.org/future-of-affirmative-action#story-cover>

a state choose to abandon race-based affirmative action programs? And more importantly, 2) in the absence of race-based affirmative action programs, how can states find other ways to successfully achieve student-body diversity at their public universities?

First, states may choose to ban affirmative action. On April 22, 2014 the Supreme Court decided *Schuette v. Coalition to Defend Affirmative Action*. The 6-2 decision determined that states may choose to prohibit the use of race-based affirmative action programs.<sup>16</sup> Although the Court, has given states the authority to abandon their use of race-based affirmative action programs, passing this type of voter referendum is exceedingly difficult.<sup>17</sup> However, the Court has given states – and their respective universities – an additional obstacle which may lead to more states and universities to steer away from race-based affirmative action programs. In *Fisher*, as previously discussed, the Court held that lower courts should not grant universities deference in the formulation of their affirmative action policies.<sup>18</sup> The Court determined that courts must “closely examine” how a given school’s process “works in practice.”<sup>19</sup> This *strict* application of the strict scrutiny standard opens the door to new challengers of any given state or university’s affirmative action policy. However, neither the courts nor university administrators seem to think *Fisher* will cause a change in approach to achieving student-body diversity. On remand, in a 2-1 decision, the Fifth Circuit determined that the University of Texas’ policies met the strict scrutiny standard.<sup>20</sup> Additionally, in the wake of the Supreme Court’s *Fisher* decision,

---

<sup>16</sup> *Schuette v. Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equal. By Any Means Necessary (BAMN)*, 134 S. Ct. 1623, 1624 (2014)

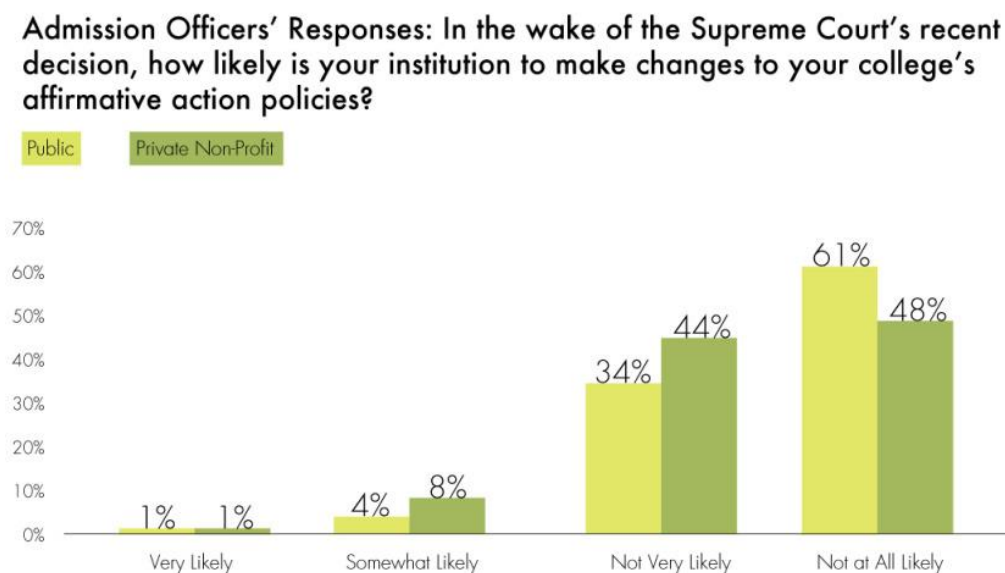
<sup>17</sup> See; <http://www.ncsl.org/research/elections-and-campaigns/initiative-referendum-and-recall-overview.aspx>

<sup>18</sup> *Fisher v. U. of Texas at Austin*, 133 S. Ct. 2411, 2416 (2013)

<sup>19</sup> *Id.*

<sup>20</sup> *Fisher v. U. of Texas at Austin*, 758 F.3d 633 (5th Cir. 2014)

more than 60% of university administrators felt the *Fisher* decision was “not at all likely” to change affirmative action policies at their respective university.<sup>21</sup>



22

In sum, the answer to the initial question is clear: states may ban the use of race-based affirmative action. Adding to this reality, *Fisher* opens race-based affirmative action programs up to the potential for an increase in legal challenges. However, what is also clear is that the courts application of strict scrutiny towards these policies has not changed in the wake of *Fisher*, nor have universities' viewpoints on their affirmative action policies. This result is perfectly reasonable – change is difficult, and there is plenty of evidence suggesting affirmative action programs work. However, as several of the states who have banned affirmative action have illustrated, there are *other* ways to achieve student-body diversity in higher education. This leads

---

<sup>21</sup> Feeling the Heat: the 2013 Survey of College and University Admissions Directors,” *Inside Higher Ed*, September 18, 2013.

<sup>22</sup> <http://apps.tcf.org/future-of-affirmative-action#story-cover>

to the next critical question. What alternatives to race-based affirmative action exist? And do they work?

### **Race-Neutral Alternatives that can Still Achieve Student-Body Diversity**

In *Fisher*, the Court concluded that the use of racial preferences in university admissions is permissible only when “no workable race-neutral alternatives would produce the educational benefits of diversity.”<sup>23</sup> I will analyze two race-neutral programs that have achieved some level of success in achieving student-body diversity. These two methods are: percentage plans and “socioeconomic affirmative action.” In addition to these programs, states seeking to achieve student-body diversity through race-neutral programs need to take additional steps to make sure these programs work. Neither of these programs are perfect, or universally effective. However, they do offer insight on potential “workable” race-neutral strategies to achieve student body diversity.

### **Percentage Plans**

Percentage plans admit students solely on the basis of their class rank within their high school graduating class.<sup>24</sup> These programs are used to some extent in California, Florida, and Texas.<sup>25</sup> Currently, these states use different variations of percentage plans, yet the results have been quite similar. In Texas, the “10 Percent Plan” guarantees admission to University of Texas – Austin (UT) to the top 10% of graduates at each high school in Texas; whereas Florida’s “Talented 20% Plan” guarantees admission to the top 20% of each high school graduating class,

---

<sup>23</sup> *Fisher v. U. of Texas at Austin*, 133 S. Ct. 2411, 2416 (2013)

<sup>24</sup> Eang L. Ngov, *Following Fisher: Narrowly Tailoring Affirmative Action*, 64 *Cath. U. L. Rev.* 1, 10 (2014)

<sup>25</sup> *Id.*

just not necessarily to the student's top choice school.<sup>26</sup> These programs each rely on one unfortunate reality: high schools within these states are not diverse. Many high schools in urban areas have extremely high concentrations of minority students, and these students are severely underrepresented at state universities.<sup>27</sup> However, with a percentage plan, states have been able to broaden the spectrum of students who are entering their universities, and have thus maintained – and even increased – student body diversity. For example, before Texas implemented the 10 Percent Plan, UT's entering class was comprised of graduates from 622 high schools, but half of those students represented only sixty-four high schools. In 2013, the number of high schools feeding into UT Austin increased to 1,102.<sup>28</sup> Not only did the number of high schools represented increase, but so did the relative percentages of diverse students. In the year following the implementation of the 10% plan, the percentage of Hispanic students enrolled at UT increased from 14% to 16% and the percentage of African-American students remained the same.<sup>29</sup> These figures show that a race-neutral alternative had the same, if not better, success in achieving student-body diversity at UT. Therefore, applying the Court's test, it seems that percentage plans may offer a workable solution to achieving student-body diversity. Yet, these plans are not without their critics. One criticism, weighing heaviest on the use of percentage

---

<sup>26</sup> CATHERINE L. HORN & STELLA M. FLORES, THE CIVIL RIGHTS PROJECT, HARVARD UNIV., PERCENT PLANS IN COLLEGE ADMISSIONS: A COMPARATIVE ANALYSIS OF THREE STATES' EXPERIENCES 16-23 (2003), *available at* <http://civilrightsproject.ucla.edu/research/collegeaccess/admissions/percent-plans-in-college-admissions-a-comparative-analysis-of-threestates2019experiences/horn-percent-plans-2003.pdf> (providing a history and detailing the mechanics of percentage plans in Texas, California, and Florida).

<sup>27</sup> *Id.*

<sup>28</sup> Eang L. Ngov, Following Fisher: Narrowly Tailoring Affirmative Action, 64 *Cath. U. L. Rev.* 1, 10 (2014)

<sup>29</sup> GARY M. LAVERGNE & BRUCE WALKER, IMPLEMENTATION AND RESULTS OF THE TEXAS AUTOMATIC ADMISSIONS LAW (HB 588) AT THE UNIVERSITY OF TEXAS AT AUSTIN: DEMOGRAPHIC ANALYSIS FALL 2003, ACADEMIC PERFORMANCE OF TOP 10% AND NON-TOP 10% STUDENTS ACADEMIC YEARS 1996-2002 (2003)

plans, is that they rely on the segregation of a state's high schools.<sup>30</sup> This unfortunate reality makes percentage plans feel like a Band-Aid on a larger systemic problem. However, while percentage plans will not cure de facto segregation in America's schools, it is certainly a possible race-neutral alternative to achieve student-body diversity in higher education.

### **“Socioeconomic Affirmative Action”**

Class-based, or “socioeconomic” affirmative action is another race-neutral method of achieving student-body diversity in higher education. Research has clearly identified that socioeconomic status weighs heavily on a student's performance on standardized tests, which are a critical factor in gaining university admission.<sup>31</sup> There is evidence that suggests that socioeconomic status has a greater impact on students' standardized test performance than any race-based factor. For instance, students “coming from a low socioeconomic background impacted students by 399 points on the SAT, as compared with race (being African American as opposed to white), which had an average impact of fifty-six points.”<sup>32</sup> Yet, colleges do little to compensate students coming from a lower socioeconomic status in regards to standardized testing.

In practice, the University of Colorado has shown that giving greater weight to socioeconomic status can have a stronger effect on student-body diversity than a race-based affirmative action program.<sup>33</sup> A great deal of this success can be attributed to the Court's treatment of class-based programs compared to race-based programs. In accordance with our

---

<sup>30</sup> Michelle Adams, *Isn't It Ironic? The Central Paradox at the Heart of "Percentage Plans"*, 62 Ohio St. L.J. 1729, 1732 (2001)

<sup>31</sup> Angela Onwuachi-Willig & Amber Fricke, *Class, Classes, and Classic Race-Baiting: What's in a Definition?*, 88 *Denv. U. L. Rev.* 807, 808-09 (2011)

<sup>32</sup> Eang L. Ngov, *Following Fisher: Narrowly Tailoring Affirmative Action*, 64 *Cath. U. L. Rev.* 1, 10 (2014)

<sup>33</sup> *Id.*



affirmative action jurisprudence, race can only be considered a “plus” or “secondary” factor, whereas, class – subject to rational basis scrutiny – can be considered a “primary” factor.<sup>34</sup> The University of Colorado system has done a better job than race-based affirmative action programs in achieving and maintaining student-body diversity.<sup>35</sup> However, socioeconomic affirmative action programs also come with criticism. The most substantial is cost. Increasing enrollment to a significantly higher percentage of economically disadvantaged students would require significant increases to scholarship programs – which may be an insurmountable burden. Yet, socioeconomic affirmative action programs, while imperfect, do illustrate another effective method to achieve student body diversity through a race-neutral system.

### **Making it Work: Retention Programs**

Enrollment is only one step in the larger challenge of creating and *maintaining* diversity in higher education. Even with the use of percentage plans or socioeconomic affirmative action programs, attracting and retaining qualified students is a challenge.

A college education offers students limitless potential – yet, this education comes at a substantial cost. Adding to this burden, students from diverse backgrounds that are aided by percentage plans and socioeconomic affirmative action are often those who are most burdened by the cost of education.<sup>36</sup> Therefore, states need to find ways to retain students from these diverse backgrounds. In practice, this comes with extreme costs, but is well worth the benefits of a diverse student body. Some states have installed effective programs to help retain diverse students. For example, the University of North Carolina at Chapel Hill “enables economically disadvantaged students to attend college debt-free by working ten to twelve hours a week in a

---

<sup>34</sup> Matthew N. Gaertner & Melissa Hart, Considering Class: College Access and Diversity, 7 Harv. L. & Pol’y Rev. 367, 396 (2013)

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

federal work-study program.”<sup>37</sup> On the other hand, Texas has reached out to the private sector to create the “Longhorn Opportunity Scholarship and the Century Scholars Program” which benefits students from underrepresented high schools in the top 10% of their class to afford their college education.<sup>38</sup> The cost of education is not the only challenge for diverse students. Academic success is often difficult for students from lower socioeconomic statuses and underrepresented high schools to achieve.<sup>39</sup>

Preparing students from diverse backgrounds is a challenge that does not begin when students matriculate. States must focus on implementing “college preparedness” programs as well as academic assistance programs for their current students. Several states and universities have spearheaded this effort with great success. For example, the University of Houston has created a K-12 charter school on its own campus, and “thereby provides 200 students exposure to “scientific methodology, technological literacy, leadership, and other skills.”<sup>40</sup> Other schools have created “future scholar” programs, which identify underrepresented K-12 districts, and allows students to come on campus to participate in rigorous academic programs that would otherwise be unavailable to these students.<sup>41</sup> These programs lead to diverse students entering a college campus with a higher level of preparedness – thus helping maintain diversity, not just at time of admission, but through graduation.

Achieving academic diversity in higher education is more than simply enrolling a “critical mass” of diverse students. Achieving academic diversity is a process that benefits not only diverse students, but their classmates, and in turn, the students’ future employers. Therefore,

---

<sup>37</sup> Dept. of Education Report; *available at*: <https://www2.ed.gov/about/offices/list/ocr/edlite-raceneutralreport2.html>.

<sup>38</sup> Eang L. Ngov, Following Fisher: Narrowly Tailoring Affirmative Action

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Texas Needs to Improve Access to College*, Dallas Morning News, Jan. 1,

states' efforts of achieving diversity in university admissions must begin before students enter college, and all the way through graduation. Retention programs utilizing financial aid and academic counseling programs allow schools to achieve *true* diversity in higher education.

### **Conclusions**

Achieving and maintaining student-body diversity in America's universities is challenge that continues nearly forty years after the Court's decision in *Bakke*. After all this time, there have been few clear answers regarding the proper use and need for race-based affirmative action programs. However, what is clear is that the Court – and state's voters and legislatures – have made efforts to limit the use of race-based affirmative action programs. The Court, in *Fisher*, sought to increase the scrutiny around these programs and several states have banned these programs altogether. However, even with these changing methods and interpretations, one thing has remained – achieving student-body diversity in higher education is important and needs to be achieved. The Court has stated that race-based programs are appropriate only when “no workable race-neutral alternatives would produce the educational benefits of diversity.”<sup>42</sup> This paper has demonstrated two distinct methods to achieve student-body diversity through race-neutral programs. Percentage plans and socioeconomic affirmative action programs are viable, race-neutral methods of achieving diversity in higher education. However, achieving this diversity is more than simply enrolling a diverse student body. As demonstrated, states and their universities need to take steps to retain a diverse student through graduation. While Justice O'Connor's “expiration date” may well expire before states cease to use race-based affirmative action programs; prior to that deadline, states have demonstrated that “workable” race-neutral programs exist and are successful in achieving student-body diversity in higher education.

---

<sup>42</sup> *Fisher v. U. of Texas at Austin*, 133 S. Ct. 2411, 2416 (2013)

